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**Supreme Court of the United States**

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OCTOBER TERM, 1942.

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**No. 451.**

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NORMAN BAKER, PETITIONER,  
VS.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H.  
HUDSPETH AS WARDEN OF UNITED STATES  
PENITENTIARY, LEAVENWORTH,  
KANSAS, RESPONDENT.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR  
THE TENTH CIRCUIT.

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**PETITIONER'S REPLY BRIEF.**

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A. G. BUSH,  
*Attorney for Petitioner.*

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**THREE QUESTIONS SUBMITTED.**

Respondent's brief (p. 2) states that two questions are presented by Petitioner. We ask you not to overlook the third point, viz.: the constitutional right to a full hearing (Petitioner's Brief p. 35).

Respondent's brief seems concerned chiefly with minimizing and glossing over the facts shown by the undisputed evidence upon which Petitioner relies.

It appears from *Hollins v. State*, 295 U. S. 39, 79 L. Ed. 500, that this Court, even upon petition for certiorari in a habeas corpus case, will examine the evidence where the undisputed evidence is alleged to establish violations of the Constitution.

In that case the Petitioner challenged the jury panel upon the ground that negroes had long been excluded from jury service on account of their race or color, thus depriving Petitioner of his constitutional right to equal protection of the law. The court said:

"From its examination of the evidence, the court is of the opinion that the case calls for the application of the principles declared in *Neal v. Delaware*, 103 U. S. 370."

## I.

### Meddling with Jury.

The opinion of the lower court omitted any reference to the lady deputies drinking highballs with the jurors on the occasion of their visits to the jurors' quarters. We assume that both the lower court and counsel for Respondent either overlooked or gallantly ignored the facts testified to by the ladies themselves in that respect.

Counsel for the government in argument and the lower court in its opinion make no distinction between sociability, entertainment, personal influence, or even poker playing and drinking at a card club, country club or other social function where such things may be considered proper and highly desirable, and social mingling with a jury segregated by order of the court, eating meals with them with continuous conversation during mealtime and while visiting at their rooms drinking highballs and playing penny ante poker with them.

In the former case, such things are commonly considered forms of conviviality which are highly desirable in building up and cementing lasting friendships.

In the latter case, the very purpose of segregation is to remove the possibility of friendly or other influences being exerted upon jurors to win their favor or friendship or in any way disturb the delicate balance of the scales of justice.

Petitioner makes no insinuation that the conduct either of the lady deputies or other deputies would have been in any degree improper in a social circle composed of the jurors as individuals.

We emphatically contend that it was grossly improper when related to jurors while acting in their capacity as jurors and segregated under order of court.

In stating that "it was not contradicted that it was at the request of one of Petitioner's trial counsel (Fred Isgrig) that the chief deputy was placed in charge of the jury," counsel for the government misinterpreted the testimony of Fred Isgrig himself who said he meant and asked merely to have Bradley appointed *as bailiff* to take charge of the jury (Rec. 435, last question and answer).

## II.

### **Juror Goggins Employed by the United States.**

This Court has recognized that no juror would be likely to admit prejudice after a verdict of conviction had been rendered by him against a defendant.

No one could testify to the juror's state of mind. In fact, there might be a predisposition to find for the government, of which the juror himself was entirely unconscious.

The question here is not whether Petitioner was prejudiced by the answer which Juror Goggins gave on *voir dire*, as suggested by counsel for the Respondent. The question is whether Juror Goggins' relation to the very department of the government concerned with the crime

for which Petitioner was convicted was likely to influence him in favor of the government and therefore against the defendant by reason of his official position in the postal service.

The Crawford and Wood cases<sup>1</sup> reserved this question for future decision by the Court. Occasion for that decision has now arisen and we submit the question should now be decided by you.

### III.

#### Constitutional Right to a Full Defense.

Respondent's brief urges that this Court's denial of certiorari in *Baker v. U. S.*, 312 U. S. 692, was an adjudication as to the alleged error of the trial court in refusing to permit Petitioner to introduce competent evidence essential to his defense.

This Court has definitely said that the refusal to grant a writ of certiorari is not an adjudication of any question involved in the application for the writ and "imparts no expression of opinion upon the merit of the case, as the Bar has been told many times."

*U. S. v. Carver*, 260 U. S. 842.

*Atlantic Coast Line v. Powe*, 283 U. S. 401.

That due process of law requires that the defendant in a criminal case have an opportunity to present every available defense has been definitely held by this Court many times.

*Moore Ice Cream Co. v. Rose*, 289 U. S. 373.

*American Surety Co. v. Baldwin*, 287 U. S. 156.

*York v. Texas*, 137 U. S. 15, 34 L. Ed. 604.<sup>2</sup>

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<sup>1</sup>*Crawford v. U. S.*, 212 U. S. 183, 53 L. Ed. 415; *U. S. v. Wood*, 299 U. S. 123, 81 L. Ed. 78.

<sup>2</sup>For discussion of the conflict in the cases on this point and the difference between a mere error and a constitutional right, see Petitioner's supporting brief, page 39.

In conclusion we ask:

**Is the Constitution binding on the trial courts of the United States?—Yes.**

**Is this court the final arbiter of constitutional questions?—Yes.**

**Will you now determine whether petitioner had a constitutional right to an uninfluenced jury, to impartial jurors, to introduce admittedly competent evidence essential to his defense?**

We submit that the answer should be "YES."

Respectfully,

A. G. BUSH,

*Attorney for Petitioner.*